A

ARAPROP DEVELOPMENT SDN BHD

v.

LEONG CHEE KONG & ANOR

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
TENGKU BAHARUDIN SHAH JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: W-02-589-2003]

C

17 SEPTEMBER 2007

LAND LAW: *Housing developer - Late delivery of vacant possession - Whether purchaser had right to terminate agreement - Whether delay in delivery beyond developer's control - Whether waiver or estoppel on the*

D *part of purchaser*

CONTRACT: *Sale and purchase of land - Late delivery of vacant possession - Whether purchaser had right to terminate agreement - Whether delay in delivery beyond developer's control - Whether waiver or estoppel on the part of purchaser*

E

The respondents commenced an action against the appellant in the High Court for, *inter alia*, the following: (1) a declaration that they were entitled to terminate a sales and purchase agreement ('SPA") executed with the appellant for failing to deliver vacant

F possession of a piece of property purchased by the respondents from the appellant; (2) recovery of sums paid by them under the SPA; and (3) damages for late delivery for vacant possession. The learned judge found in favour of the respondents. Hence, the appellant's appeal. The issues were: (1) whether the respondents

G were entitled to terminate the SPA since they had assigned their rights thereunder to the Malaysia Building Society Berhad ('MBSB') by virtue of a loan agreement taken with MBSB; (2) whether the delay to deliver vacant possession was due to circumstances beyond the appellant's control; and (3) whether

H there was waiver and/or estoppel on the part of the respondents when they were silent upon the due date for delivery of vacant possession on 15 March 1999.

I

Held (dismissing the appeal by a majority)
Per Mokhtar Sidin JCA (with Tengku Baharudin Shah JCA concurring):

(1) The issue whether or not a deed of assignment is an absolute assignment and not by way of charge only within s. 4(3) of the Civil Law Act 1956, is to be determined from the four corners of the agreement itself (See Federal Court case of *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor*). In the present appeal, it was clear that the deed of assignment under s. 13 of the loan agreement between MBSB and the respondents was an absolute assignment and not by way of charge. (paras 18 & 20)

(2) There was no merit in the appellant's contention that the reassignment was of no effect because it was served on the appellant on 15 August 2001 after notice to terminate the SPA was given earlier on 30 June 2001. The absolute assignment did not apply to a notice to terminate. It only prohibited the institution of an action. Notice to terminate was only a warning and it did not necessarily follow that a court action would be instituted. The crucial date was the date of filing of the action on 16 October 2001, some two months after the deed of assignment was served on the appellant. Therefore, when the respondents instituted the present action the absolute assignment had been lifted. (para 21)

(3) The learned judge was absolutely correct when he stated that the respondents had the choice of terminating the SPA, alternatively, claiming damages for late delivery. The respondents could not terminate the S & P and claim damages for late delivery as well. The learned judge only allowed the termination and not the damages. For that reason, there was no error in the judgment of the learned judge. (para 23)

(4) The delay to deliver vacant possession was not a delay as stipulated by the exclusion clause, *ie*, cl. 22 of the SPA. The delay was by the appellant's sub-contractors who were under the control of the appellant. The SPA clearly provided for a completion date and that was also true in the sub-contracts. The appellant could have terminated the sub-contracts when it became obvious that the sub-contractors could not complete the works within the stipulated time. However, the appellant

did nothing and used cl. 22 as an excuse for the delay. It followed that the delay was not a delay within the said exclusion clause. (paras 29 & 30)

(5) The respondents did not dispute the fact that they did nothing when the date of delivery for vacant possession came into being. The appellant termed that as silence on the part of the respondents. Silence by itself was not a waiver unless there was an additional factor with the silence that could be interpreted as a waiver and/or an estoppel. There was no act on the part of the respondents that could be constituted as a waiver or an estoppel. (para 33)

(6) On whether the learned judge erroneously treated the SPA as having been rescinded instead of being terminated, the word "menamatkan" used by the learned judge in his Bahasa Malaysia judgment did not indicate whether the termination was a rescission or a repudiation. The respondents terminated the S & P agreement because the appellant breached the agreement when it did not deliver vacant possession of the subject property within time. When a termination results from a breach of one of the parties, the innocent party should be placed in the same position as it was before the agreement. The respondents herein were the innocent parties and they claimed damages for whatever money paid by them and by MBSB. The appellant did not dispute that. (paras 34 & 35)

Per Zaleha Zahari JCA (dissenting):

(1) Delivery of vacant possession of the said property was to be effected within 30 calendar months from the date of the SPA on 15 March 1999. Time was made the essence of the SPA by cl. 16(2) thereof. If the said property was not delivered within the agreed period, the appellant would pay the respondents liquidated damages. (para 42)

(2) The SPA required the appellant to provide basic infrastructure work. From the Third Schedule to the SPA, the completion of the basic infrastructure work was the last stage before the delivery of vacant possession. The Fourth Schedule to the SPA showed that the basic infrastructure work was the last stage before the delivery of vacant possession. The Fourth Schedule to the SPA showed that the basic infrastructure

included telephone services and electrical infrastructure. It was clear that there was a delay in completion of the basic infrastructure work. (para 43)

(3) As early as November 1998 the appellant had completed all that they could under the project leaving that which was to be completed by TNB. The delay in completing the electrical infrastructure was the cause of the delay in delivery of vacant possession. As at March 2000, the electrical infrastructure works were still not completed by TNB and the appellant was still pressing for the supply of electricity by TNB. In that circumstances, the learned judge was clearly right in finding that there had been a breach of the SPA by the appellants. (para 44)

(4) Section 40 of the Contracts Act 1950 ('the Act') uses the phrase "in its entirety" in describing the extent of the breach. The contract breaker must have "refused to perform … his promise in its entirety" before the "promisee may put an end to the contract". Section 56(1) of the Act uses the phrase "fails to do any such thing at or before the specified time" to describe the nature of the breach which would make a contract voidable. (para 46)

(5) Where a promissory wrongfully repudiates a contract in its entirety, the promisee has a choice. The promisee may elect to accept the repudiation and treat the contract as at an end and sue for damages. The primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. Alternatively, the promisee may elect to reject the repudiation and treat the contract as subsisting. The court has to make an objective appraisal of the facts from the words and conduct of the parties as to which course was adopted. An election once made is irreversible. For the doctrine of repudiation to apply, the breach must go to the root of the contract. (para 47)

(6) At common law, the right to "rescind" a contract by way of termination only arises when there has been a total failure of consideration. In the present case, there was no refusal by the appellant to perform the contract by not doing the things it promised to do within the time specified by the contract in its entirety. There was no total failure of consideration. From the

Certificate for Stage of Construction of Works, it was clear that the appellant had completed its part in developing the said property on 27 April 1998 which was a year before the delivery date of vacant possession on 15 March 1999. What remained to be completed was the remaining basic infrastructure. The appellant had no problem with TNB. The delay in delivering the property was caused by delays of the relevant authorities in circumstances beyond the appellant's control. That did not amount to a failure to do all of the things that the appellant had promised. There was no fundamental breach by the appellant. By virtue of s. 40 of the Act, the appellant's breach did not go to the root of the contract. (paras 51 & 52)

(7) By allowing the delivery dates to pass by and by acquiescing in the work continuing under the agreement, the respondents must be held to have waived their right to rescind the SPA on account of repudiation and also the right to treat themselves as discharged therefrom. On the facts, they must be deemed to have elected to treat the SPA as still continuing. (para 53)

(8) As for delay in delivery, cl. 16(2) of the SPA provided for the formula for compensation that the appellant must pay for its lateness. That was the clause which the respondents should seek recourse to as it created a contractual obligation to pay by way of liquidated damages for the period during which they were kept out of the property which they had purchased, such sum being calculated upon the basis set out in the agreement. (para 54)

(9) The learned judge erred in holding that the SPA had been lawfully terminated and consequentially also in ordering a refund of the purchase price paid as well as the other financial charges or disbursements. The appeal should be allowed with half costs awarded to the appellant. The orders of the High Court should be set aside. (paras 55 & 56)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden memulakan tindakan terhadap perayu di Mahkamah Tinggi antara lain untuk relif-relif berikut: (1) satu deklarasi bahawa mereka berhak menamatkan perjanjian jual beli ('SPA') dengan perayu atas kegagalan perayu menyerahkan

milikan kosong hartanah yang dibeli oleh mereka daripada perayu; (2) bayaran balik jumlah yang dibayar oleh mereka di bawah SPA; dan (3) gantirugi kerana kelewatan menyerahkan milikan kosong. Yang arif hakim mendapati untuk responden-responden dan perayu merayu. Isu-isunya adalah: (1) sama ada responden-responden berhak menamatkan SPA memandangkan bahawa mereka telah menyerahhak hak-hak mereka di bawah perjanjian pinjaman dengan Malaysia Building Society Berhad ('MBSB'); (2) sama ada kelewatan untuk menyerah milikan kosong adalah disebabkan oleh keadaan yang di luar kawalan perayu; dan (3) sama ada terdapat waiver dan/atau estopel oleh responden-responden bilamana mereka hanya berdiam diri pada tarikh penyerahan milikan kosong pada 15 Mac 1999.

Diputuskan (menolak rayuan melalui keputusan majoriti) Oleh Mokhtar Sidin HMR (Tengku Baharudin Shah HMR menyetujui):

(1) Isu sama ada atau tidak sesuatu perjanjian itu adalah satu perjanjian yang mutlak dan bukannya satu gadaian menurut maksud s. 4(3) Akta Undang-Undang Sivil 1956, hendaklah ditentukan berdasarkan kandungan instrumen itu sendiri (Lihat kes Mahkamah Persekutuan *Phileoallied Bank (Malaysia) Bhd v Bupinder Singh Avatar Singh & Anor*). Dalam rayuan semasa, jelas bahawa suratikatan serahanhak di bawah s. 13 perjanjian pinjaman di antara MBSB dan responden-responden adalah satu serahanhak yang mutlak dan tidak dimaksudkan sebagai satu gadaian.

(2) Tiada merit pada hujah perayu bahawa serahanhak semula adalah tidak berkesan kerana ia diserah kepada perayu pada 15 Ogos 2001 selepas notis penamatan SPA disampaikan pada 30 Jun 2001. Serahanhak mutlak tidak terpakai kepada notis penamatan. Ia sekadar menghalang pengambilan tindakan. Notis penamatan hanyalah satu amaran dan ia tidak semestinya mengikut bahawa suatu tindakan mahkamah akan menyusul. Tarikh yang penting adalah tarikh pemfailan tindakan pada 16 Oktober 2001, iaitu dua bulan setelah suratikatan serahanhak diserahkan kepada perayu. Oleh itu, apabila responden-responden memulakan tindakan semasa, serahanhak mutlak telah pun ditarik balik.

(3) Yang arif hakim betul sepenuhnya apabila beliau menyatakan bahawa responden-responden mempunyai pilihan untuk menamatkan SPA, ataupun secara alternatif menuntut gantirugi kerana kelewatan serahan. Adalah jelas bahawa responden-responden tidak boleh menamatkan SPA dan menuntut gantirugi kerana kelewatan serahan. Yang arif hakim hanya membenarkan penamatan dan tidak gantirugi. Untuk itu, tiada kesilapan pada penghakiman yang arif hakim.

(4) Kelewatan untuk menyerah milikan kosong bukanlah kelewatan seperti yang dinyatakan di dalam fasal menyingkir, iaitu fasal 22 SPA. Kelewatan adalah oleh sub-kontraktor perayu yang berada di bawah kawalan perayu. SPA jelas memperuntukkan tarikh siap dan begitu juga dengan sub-kontrak. Perayu boleh menamatkan sub-kontrak apabila ianya nyata bahawa sub-kontraktor sudah tidak lagi mampu menyiapkan kerja-kerja dalam tempoh yang ditetapkan. Perayu, bagaimanapun, tidak berbuat apa-apa dan menggunakan fasal 22 SPA sebagai alasan bagi kelewatan. Ianya mengikut bahawa kelewatan bukanlah kelewatan menurut maksud fasal penyingkiran.

(5) Responden-responden tidak mempertikai fakta bahawa mereka tidak berbuat apa-apa apabila tarikh untuk menyerahkan milikan kosong tiba. Perayu menganggap itu sebagai berdiam diri di pihak responden-responden. Berdiam diri, semata-mata itu, tidak boleh ditafsir sebagai waiver kecuali jika ia disertai oleh satu faktor tambahan yang boleh dianggap sebagai waiver dan/atau estopel. Tidak ada tindakan di pihak responden-responden yang boleh menjadikannya satu waiver ataupun estopel.

(6) Berkaitan sama ada yang arif hakim menangani SPA secara salah apabila menganggapnya sebagai dibatalkan dan bukan ditamatkan, perkataan "menamatkan" oleh yang arif hakim dalam penghakiman rasmi Bahasa Malaysianya tidak menunjukkan sama ada penamatan adalah satu pembatalan atau penolakan. Responden-responden menamatkan SPA kerana perayu memungkiri perjanjian itu apabila ia tidak menyerahkan milikan kosong hartanah tersebut di dalam tempoh masa. Bilamana penamatan diakibatkan oleh kemungkiran mana-mana pihak, pihak yang tidak bersalah hendaklah diletak pada posisinya yang asal seperti sebelum perjanjian. Responden-responden di sini merupakan pihak-pihak

yang tidak bersalah dan mereka menuntut gantirugi atas apa-apa wang yang dibayar oleh mereka dan oleh MBSB. Ini tidak dipertikai oleh perayu.

Oleh Zaleha Zahari HMR (menentang):

(1) Penyerahan milikan kosong hartanah tersebut perlu dibuat dalam tempoh 30 bulan kalendar dari tarikh SPA 15 Mac 1999. Masa telah dijadikan intipati SPA oleh fasal 16(2). Jika hartanah tersebut tidak diserahkan dalam tempoh yang dipersetujui, maka perayu hendaklah membayar responden-responden gantirugi jumlah tertentu.

(2) SPA mengkehendaki perayu supaya menyediakan kerja-kerja asas infrastruktur. Dari Jadual Ketiga SPA, penyiapan kerja-kerja asas infrastruktur adalah peringkat terakhir sebelum penyerahan milikan kosong. Jadual Keempat SPA juga menunjukkan bahawa kerja-kerja asas infrastruktur adalah peringkat terakhir sebelum penyerahan milikan kosong. Jadual Keempat SPA menunjukkan bahawa infrastruktur asas adalah termasuk perkhidmatan telefon serta infrastruktur elektrik. Adalah jelas bahawa berlaku kelewatan dalam penyiapan kerja-kerja asas infrastruktur.

(3) Seawal November 1998, perayu telah menyiapkan setakat kemampuan mereka semua kerja-kerja di bawah projek dan hanya meninggalkan kerja-kerja yang perlu disiapkan oleh TNB. Kelewatan menyiapkan infrastruktur elektrik adalah penyebab kepada kelewatan menyerahkan milikan kosong. Setakat Mac 2000, kerja-kerja infrastruktur elektrik masih lagi belum disiapkan oleh TNB dan perayu terpaksa mendesak TNB untuk bekalan elektrik tersebut. Dalam keadaan sedemikian, yang arif hakim jelas betul dalam mendapati bahawa berlaku kemungkiran SPA oleh perayu.

(4) Seksyen 40 Akta Kontrak 1950 ('Akta') menggunakan ungkapan "keseluruhan" apabila memperihalkan tahap kemungkiran. Pemungkir kontrak hendaklah "enggan melaksanakan ... keseluruhan janjinya" sebelum promisee boleh menamatkan kontrak". Seksyen 56(1) menggunakan ungkapan "gagal melakukan mana-mana perkara tersebut pada atau sebelum masa yang ditetapkan" bagi memperihalkan sifat kemungkiran yang menjadikan kontrak boleh dibatalkan.

(5) Di mana promissory dengan salahnya menolak keseluruhan kontrak, promisee mempunyai pilihan. Promisee boleh memilih untuk menerima penolakan dan menganggap kontrak sebagai telah berakhir dan memulakan tindakan untuk mendapat gantirugi. Obligasi utama untuk melaksanakan janji yang dibuat telah diganti dengan obligasi sekunder untuk mempampasi promisee di atas kemungkiran yang dilakukan. Secara alternatif, promisee boleh memilih untuk menolak penolakan dan menganggap kontrak sebagai masih berkuatkuasa. Mahkamah pula perlu membuat penilaian yang objektif terhadap fakta-fakta dari perkataan-perkataan dan kelakuan pihak-pihak. Pemilihan, sebaik sahaja dibuat, tidak boleh ditarik balik. Untuk doktrin penolakan terpakai, kemungkiran hendaklah menyentuhi akar umbi kontrak.

(6) Di sisi undang-undang common, hak untuk "membatalkan" kontrak melalui penamatan hanya berbangkit apabila terdapat kegagalan balasan yang mutlak. Dalam kes semasa, perayu bukanlah enggan melaksanakan kontrak atau enggan melakukan keseluruhan apa yang dijanjikannya dalam tempoh masa yang ditetapkan oleh kontrak. Berdasarkan Sijil bagi Tahap Kerja Pembinaan, adalah jelas bahawa perayu telah melaksanakan bahagiannya untuk membangunkan hartanah tersebut pada 27 April 1998 iaitu setahun sebelum penyerahan milikan kosong hartanah tersebut pada 15 Mac 1999. Apa yang perlu disiapkan seterusnya adalah infrastruktur asas. Perayu tiada apa-apa masalah dengan TNB. Kelengahan menyerahkan hartanah adalah disebabkan oleh kelewatan yang dilakukan oleh pihakberkuasa-pihakberkuasa yang relavan yang di luar kawalan perayu. Itu bukan bererti gagal melakukan semua perkara yang perayu telah janjikan. Tidak ada kemungkiran fundamental oleh perayu. Maka berdasarkan s. 40 Akta, kemungkiran perayu tidak merangkumi akar umbi kontrak.

(7) Dengan membiarkan tarikh penyerahan berlalu dan dengan menerima penerusan kerja-kerja di bawah kontrak, responden-responden dianggap telah melupuskan hak mereka untuk membatalkan SPA atas alasan penolakan dan hak untuk menganggap diri mereka sebagai tidak bertanggungan kerananya. Di atas fakta, mereka hendaklah dianggap sebagai telah memilih SPA sebagai masih berjalan.

(8) Berhubung dengan kelengahan penyerahan, fasal 16(2) SPA memperuntukkan suatu formula untuk pampasan yang harus dibayar oleh perayu atas kelewatannya. Itulah fasal yang responden-responden perlu bergantung kerana ia mencipta obligasi untuk membayar gantirugi jumlah tertentu bagi tempoh yang responden-responden dipisah dari hartanah yang mereka beli, iaitu jumlah yang dikira berdasarkan asas-asas yang disediakan di dalam perjanjian.

(9) Yang arif hakim khilaf dalam memutuskan bahawa SPA telah ditamatkan dengan sahnya dan kerana memerintahkan pembayaran balik harga belian serta lain-lain bayaran dan caj. Rayuan patut dibenarkan dengan separuh kos diberikan kepada perayu. Perintah-perintah Mahkamah Tinggi harus diketepikan.

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Bowes v. Chalever [1923] 32 CLR 159 ***(refd)***

Charles Richards Ltd v. Oppenheim [1950] 1 All ER 420 ***(refd)***

Cheah Khoon Tee v. Crimson Development Sdn Bhd [1999] 8 CLJ 79 HC ***(refd)***

Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd [2002] 4 CLJ 796 HC ***(refd)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 ***(refd)***

Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha [1962] 2 QB 26 ***(refd)***

Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987]1 LNS 37 PC ***(refd)***

Mayson v. Clouet & Anor [1924] AC 980 ***(refd)***

Moshi v. Lep Air Services [1973] AC 331 ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All ER 556 ***(refd)***

Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 3 CLJ 275 HC ***(refd)***

Sergent v. ASL Development Ltd [1974] 131 CLR 634 ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

Tai Kim Yew & Ors v. Sentul Raya Sdn Bhd [2004] 3 CLJ 310 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Contracts Act 1950, ss. 40, 56(1), 65

For the appellant - Darryl Goon (Robyn Choi with him); M/s Rashid Zulkifli For the respondents - Renu Zachariah (Yusrin Faidz Yusoff with her); M/s Faidz Leong & Chong

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-3734-2001]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

[1] On 15 September 1996, the appellant and the respondents executed a Sale and Purchase Agreement (S&P) whereby the respondents agreed to purchase and the appellant agreed to sell a piece of property known as Plot No. 2-188, Bukit Mahkota, Phase 2, Mukim Beranang, Selangor Darul Ehsan in the sum of RM281,445. The respondents have paid RM217,011.50 equivalent to 80% of the purchase price based on the certificates issued by the architect. To finance the balance of the purchase price the respondents obtained a loan from Malaysia Building Society Berhad (MBSB) in the sum of RM64,400. Out of this sum MBSB paid RM8,111 to the appellant.

[2] Under the terms of the S&P the appellant should deliver vacant possession of the said property to the respondents within 30 months from the date of signing the agreement. Vacant possession of the said property should be delivered by the appellant to the respondents on or before 15 March 1999. Though the respondents stated that vacant possession should be delivered on or before 15 June 1999, it was not disputed that the date of delivery of vacant possession should be 15 March 1999. It was also not disputed that there was a delay in delivering vacant possession of the property. As a result of the delay the respondents terminated the S&P on 30 June 2001. It was also not disputed that the total number of days of the delay was 837 days. With the termination of the S&P the respondents' solicitors demanded the return of the total amount paid by them. When the appellant failed to return the amount paid, the respondents filed an originating summons dated 16 October 2001 seeking, *inter alia*, the following:

(a) a declaration that the appellant have breached the terms of the S&P and the respondents were entitled to terminate the contract on 30 June 2001 or whichever date the court deems fit.

(b) the respondents are entitled to recover the sum of RM217,011 paid to the appellant being part payment of the purchase price already paid by the respondents;

(c) the appellant is to refund the sum of RM8,111 paid by MBSB to the appellant on behalf of the respondents and interest imposed by MBSB in respect of the loan given to the respondents;

(d) damages for late delivery of vacant possession from 15 March 1999 to the date of termination to be assessed as stipulated in the S&P;

(e) further damages and/or aggravated damages; and

(f) costs and interest thereon;

[3] It is not disputed that the date of delivery of vacant possession was 15 March 1999 and not as stated in the O.S. and the affidavit in support of the application. In its affidavit in reply the appellant stated that though there was a delay in delivering vacant possession the respondents have no right to terminate the S&P and/or bring a claim against the appellant. The appellant also stated it was at all times ready, able and willing to fulfill its obligations under the S&P and any delay in delivering vacant possession was caused by circumstances beyond the appellant's control. For that reason, the appellant was not liable to the respondents in any manner whatsoever.

[4] The appellant's affidavit further stated that the delay was beyond the appellant's control in that:

1. The appellant had appointed Maxis Broadband Sdn Bhd (formerly known as Bina Sat-Com Network Sdn Bhd, hereinafter referred to as "the telephone contractor") *vide* an agreement dated 27.8.1997 to carry out works to install the telephone services on the said property.

2. However, the telephone contractor failed to perform the works to install the telephone services on the said property within the agreed time frame.

A 3. The appellant, through its solicitors, Tetuan Azam Malek & Soh had written a letter to the telephone contractor on 7.5.1998 regarding this matter. (The correspondences in respect of this were exhibited in the affidavit).

B **[5]** In the court below the appellant claimed that the telephone contractor had breached the contract when the contractor failed to perform the terms under the contractor's agreements and this is beyond the control of the appellant. The appellant further claimed that since 13 November 1996 it had applied to Tenaga Nasional Berhad (TNB) to supply electricity to the said property C but TNB had neglected, failed or refused to perform the works including, but not limited to the supply of poles and cables to facilitate the supply of electricity. (The correspondences in respect of this were also exhibited in the affidavit). The appellant submitted that since TNB is the only company that provides D electricity supply, the failure by TNB to supply electricity to the said property is beyond the control of the appellant. Despite that the appellant had endeavoured to hasten the TNB to complete the works.

E **[6]** The appellant submitted that the failure by the telephone contractor and the TNB to complete their works was beyond the control of the appellant and as such the appellant is protected by cl. 22 of the S&P. Further, the appellant would not be liable.

F **[7]** In its affidavit, the appellant averred that the respondents failed to state their intention to strictly assert their rights and as such they have no right to terminate the S&P. The respondents failed to give any notice to the appellant soon after the discovery of the delay as provided for by cl. 16 of the S&P. Clause 16.1 G provides that a proper notice be given on discovering the delay. Since the respondents failed to give a proper notice, the appellant was led to believe that the appellant was allowed to remedy the breach. Further, by their own action, the respondents had rendered that time was no longer the essence.

H **[8]** The appellant also submitted that if there was any breach, the respondents had already accepted it and for that reason the respondents' claim for the return of the sum already paid is inconsistent with their claim for damages. The S&P also provides for damages due to delay. The respondents in the present appeal I are not allowed to apply for a declaration to terminate the S&P and at the same time claim for damages for late delivery under the S&P.

[9] The learned judge in his judgment stated that the appellant failed to prove that the delay was circumstances beyond the control of the appellant. As such, cl. 22 of the S&P is not applicable to protect the appellant. The learned judge took the view that under cl. 13 of the S&P the appellant was under an obligation to ensure that the basic infrastructure works were to be in accordance with the Fourth Schedule of the S&P. The learned judge was also of the view that s. 56 of the Contracts Act 1950 gives the respondents the right to choose whether or not to continue with the S&P.

[10] The learned judge then gave judgment in favour of the respondents and made the following order:

(i) a declaration that the S&P dated 15 September 1996 had been terminated on 30 June 1996 by the respondents;

(ii) the appellant has to return monies amounting to RM217,011.50 paid by the respondents to the appellant;

(iii) the appellant has to return monies paid by MBSB on behalf of the respondents to the appellant for the amount of RM8,111 together with interest thereon;

(iv) the appellant has to return all legal costs that had been paid to perfect the S&P in the sum of RM3,818.56;

(v) interest over the second and third from the date of filing of the action to the date of payment.

[11] Not satisfied with that decision the appellant appealed to this court. Before us the appellant raised the following issues:

1. Respondents had no right to terminate.

2. The delay was beyond the appellant's control.

3. Waiver and/or estoppel.

1. Respondents Had No Right To Terminate

[12] Learned counsel for the appellant submitted that when the respondents purported to terminate the S&P by the letter dated 30 June 2001, the respondents did not have the capacity and the right to do so because on that date they had assigned all their rights, benefits and remedies under the S&P to MBSB. The Deed of Assignment dated 30 September 1998 states:

A … ASSIGNS absolutely to MBSB all the Assignor's(s') right title and interest in and to the Said Property and the full and entire benefit under the Sale Agreement together with all the stipulations contained therein and all remedies for enforcing the same which MBSB hereby accepts …

B **[13]** The appellant's counsel submitted that the effect of the assignment is that all the respondents' right, title and interest in the land and all benefits and remedies that the respondents had under the S&P had been assigned to MBSB. The appellant then cited the cases of *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank*
C *Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41; *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 and *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231.

D **[14]** In reply, the respondents submitted that the assignment was not an absolute assignment but only intended as a security for a loan of RM64,400 of which RM8,111 was disbursed to the appellant. The respondents then cited the cases of *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275; *Tai Kim Yew &*
E *Ors v. Sentul Raya Sdn Bhd* [2004] 3 CLJ 310 and *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796. This is provided for under ss. 13 and 27 of the loan agreement with MBSB wherein it is stated that the assignment is required "for better securing the repayment and payment of the loan and
F interest …" and that "a charge … be entered in favour of MBSB to secure repayment to MBSB of the balance loan then due and all other monies together with interest thereon …". The respondents also submitted that in equity it is also unreasonable to argue that there is an absolute assignment of rights to MBSB
G for the extension of a RM64,400 loan (of which only RM8,111 was disbursed) while the respondents have themselves paid in excess of RM200,000 pursuant to the S&P.

[15] The respondents further submitted that in any event MBSB
H had given its consent to the action whereby MBSB through the Deed of Conditional and Partial Reassignment dated 7 August 2001 had reassigned the right to take action to the respondents where it was clearly and expressly set out and indicate that the right to sue on the S&P is reassigned to the respondents and lies
I with them. This Deed of Conditional and Partial Reassignment was served on the appellant *vide* a letter dated 15 August 2001 and the appellant had knowledge of it.

[16] Apparently, the learned judge did not touch on this in his judgment. Before us the appellant raised this issue again and it is for us to consider this. In my view, we have first to consider whether the assignment was absolute. If it is so, whether the Deed of Conditional and Partial Reassignment gave the respondents the right to institute the present case. The appellant relied on *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41. In that case the respondent, a licensed bank, entered into an agreement with the appellant, an incorporated company, whereby the respondent granted a loan of RM1m to the appellant repayable with interest at the rate of 13.5% p.a. or such rate as the respondent may specify from time to time, in accordance with the terms and conditions specified in the agreement. It was also provided in the agreement that the appellant would remain in possession of a floor of a building in Penang as a contractual licensee only of the respondent. It was also provided that in the event of default in the payment of the instalment payments covenanted in the agreement the respondent was to be at liberty to demand immediate payment of the balance and in the event of any part of the same remaining unpaid after 14 days from the date of such demand, the respondent would have the right to terminate the licence of the appellant by notice in writing and to enter upon the property to deal with it as owner thereof in all aspects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer the property at such price and in such manner as the respondent deems fit and free from any interest of the appellant. By way of security for the loan the appellant also executed a deed of assignment whereby it assigned absolutely to the respondent all its right, title and interest in the said property in respect of a sale agreement whereby the appellant had bought the property from a company in Penang. The appellant defaulted in the instalments. The respondent, after issuing notices of demand and notices to the appellant commenced proceedings in the High Court in Penang seeking a declaration of sum due and owing by the appellant under the agreement and also for an order that the appellant do quit and deliver up possession of the property within seven days of the service of the court order. Further, the respondent was to be at liberty to sell the property by public auction or private treaty. The learned judge gave judgment in favour of the respondent. On appeal the Supreme Court held that the deed was an absolute assignment and not purporting to be by

way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. The deed clearly purports and is intended in point of form to be an absolute assignment because of the use of the words 'absolutely'. Gunn Chit Tuan SCJ (as he then was) delivering the judgment of the court said at p. 44:

> We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank*'s case but with a deed of assignment. We would therefore reiterate what this court has said in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* that 'whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. Now, whatever the parties might have as lay men stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn Bhd of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it; and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of $1m to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:
>
> > In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee all his right title and interest in and to the property and under the agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.
>
> Looking at the document we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property. …

[17] In *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, the appellant purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johore Bahru for the sum of $184,320. Subsequently, the appellant entered into an agreement with Public Bank, which agreed to give the appellant a fixed loan of $92,160. The appellant entered into a loan agreement with the bank and also executed an assignment of all his rights, title and interest in the property pending the issue of the strata title to the bank. Subsequently, the respondent purchased from the developer the whole shopping and office complex excluding those units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned Judicial Commissioner upheld the objection and struck out the proceedings. The appellant appealed. The Federal Court held:

> 1. whether or not an agreement is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act, 1956 is to be gathered only from the four corners of the instrument itself;
>
> 2. the document in this case was an absolute assignment not purporting to be a charge only within the meaning of section 4(3) of the Civil Law Act and therefore the appellant was not competent to maintain the action when it was filed.

[18] In *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621, the respondents entered into a sale and purchase agreement with the developer to purchase a shop unit in the Phileo Promenade, the Corporate Park in Kuala Lumpur. To finance the purchase, the respondents obtained a term loan from the appellant. The loan agreement cum assignment was entered into under which the respondents' rights, title and interest under the sale and purchase agreement were absolutely assigned to the appellant. The two respondents also executed a joint power of attorney in favour of the appellant. The loan was fully disbursed by the appellant. The individual strata titles had not been issued yet. The respondents had defaulted on the monthly payments. Consequent to the default, the appellant demanded

repayment of the balance of the loan amount. As there was no response from the respondents, the appellant's solicitors sent a letter terminating the respondents' licence to occupy the relevant property. At the same time, they notified the respondents on the appellant's intention to sell the property. The advertisement to sell the property indicated that a public auction would be held. One day before the scheduled public auction, the respondents filed an originating summons and obtained an *ex parte* injunction to restrain the holding of the public auction of the property. The order was subsequently confirmed by the High Court after hearing both parties. The appeal to the Court of Appeal was dismissed. Leave was granted by the Federal Court on the question of whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge. In allowing the appeal the Federal Court held that whether or not an agreement was an absolute one, not purporting to be by way of charge only, within the meaning of s. 4(3) of the Civil Law Act 1956, was to be gathered only from the four corners of the instrument itself. The Federal Court was of the view that the document in this case was an absolute assignment not purporting to be a charge only within the meaning of that provision and therefore the respondents were not competent to maintain the action when it was filed. Abdul Malek Ahmad FCJ (as he then was) delivering the judgment of the court stated at p. 626:

> Three clauses in the loan agreement cum assignment stand out for consideration. The first is cl 8 which reads as follows:
>
> 8. Assignment
>
> For the consideration aforesaid, the borrower hereby absolutely assigns to the bank the full and entire borrower's benefits, rights, title and interest in and to and under the sale agreement and in the said property together with the borrower's right of enforcement thereof or thereunder, PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provision of this assignment, the borrower shall and hereby undertakes to continue to observe, perform and be bound by all, whatsoever conditions, covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement.

[19] Further down at p. 628 his Lordship said:

Clause 8 thus makes it clear that upon its true construction, this is an absolute assignment under s. 4(3) of the Civil Law Act 1956 ('the CLA') which states:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee other person from whom the assignor would have been entitled to receive or claim, the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, the power to give a good discharge for the same, without the concurrence of the assignor.

In *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1984] 1 CLJ 56; [1985] CLJ (Rep) 231, the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johor Bahru for the sum RM184,320. Subsequently, the appellant entered into an agreement with Public Bank which agreed to give the appellant a fixed loan of RM92,160. The appellant also executed an assignment to the bank of all his rights, title and interest in the property pending the issue of the strata title. Subsequently, the respondent purchased from the developer the whole shopping and office complex, excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons, the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned judicial commissioner upheld the objection and struck out the proceedings. The appellant appealed.

It was held by the Federal Court (Wan Suleiman, Seah and Mohamad Azmi FCJJ) that whether or not an agreement is an absolute one, not purporting to be by way of charge only, within the meaning of s. 4(3) of the CLA, is to be gathered only from the four corners of the instrument itself, and the document in this case was an absolute assignment not purporting to be a charge only within the meaning of that provision, and therefore, the appellant was not competent to maintain the action when it was filed.

The relevant passage of the judgment delivered by Seah FCJ is as follows at p. 234; 235:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s. 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v. Pump House Hotel Co Ltd* [1902] 2 KB 190). Having stated the preliminary and before we examine the terms of the document of assignment dated 18 February 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.
>
> Since the respondents in the instant appeal were in the same position as the appellant in *Nouvau Mont Dor*, it is our view and it follows that the respondents are not competent to maintain the originating summons.

[20] In the present appeal, under the loan agreement between MBSB and the respondents the Deed of Assignment is under s. 13 which states as follows:

> SECTION 13 SECURITIES
>
> (a) DEED OF ASSIGNMENT
>
> For better securing the repayment and payment of the Loan and interest thereon and all other monies and liabilities whatsoever as may now or at any time from time to time owing or payable by the Borrower(s) to MBSB in respect of the Loan and under the terms of this Agreement the Borrower(s) shall, simultaneously with the execution of this Agreement execute and deliver in favour

> of MBSB a deed of assignment duly consented by the Vendor/ Developer assigning all the Borrower(s) rights title and interest and the full and entire benefits in the said Property and the Sale and Purchase Agreement to MBSB and that MBSB shall hold the Said Property as the absolute owner thereof to secure the Loan (hereinafter referred to as "the Deed of Assignment").

From the above, it is clear to me that the Deed of Assignment is an absolute assignment and not purporting to be by way of a charge only. In the Deed of Assignment between the respondents and MBSB and consented to by the appellant it is stated as follows:

> NOW IT IS HEREBY AGREED as follows:
>
> 1. In consideration of MBSB having agreed to grant the Assignor(s) the Loan upon the terms and conditions contained in the Loan Agreement the Assignor(s) as beneficial owner hereby ASSIGNS absolutely to MBSB all the Assignor's(s) right title and interest in and to the Said Property and the full and entire benefit under the Sale Agreement together with all the stipulations contained therein and all remedies for enforcing the same which MBSB hereby accepts and the Assignor(s) shall at all times hereafter save harmless and keep MBSB indemnified against all actions proceedings damages penalties costs claims and demands by reason or on account of the breach or non-observance of all or any of the stipulations on the part of the Assignor(s) to be performed and observed and contained in the Sale Agreement or otherwise howsoever by reason or on account of this Assignment.

[21] Even though the assignment was absolute, the matter does not end there. It is not disputed that on 7 August 2001, MBSB had, by the Deed of Conditional and Partial Reassignment, reassigned the right to institute the present action to the respondents. This reassignment was served on the appellant on 15 August 2001. The appellant contended that the Reassignment Deed was of no effect because the respondents had given notice to terminate the S&P earlier, ie, on 30 June 2001. The notice to terminate was given before the Reassignment Deed was given to the respondents by MBSB. I am of the view that there is no merit in the appellant's contention. The absolute assignment, in my view, is only a prohibition to institute an action and is not applicable to notice to terminate. Notice to terminate is only a warning and it does not necessarily follow that a court action would be instituted. The crucial date is the date of filing the action in court which, in this case, was the filing of the originating

summons which took place on 16 October 2001. This date was some two months after the deed was served on the appellant. It is clear to me that when the respondents instituted the present action the absolute assignment had been lifted. For that reason, we see no merit in the appellant's contention on this issue.

[22] As to the issue of whether the respondents have the right to terminate the S&P in view of a clause providing for damages for late delivery, the learned judge in his judgment stated as follows:

> Section 56 of the Contracts Act 1950 clearly gives the plaintiff a right of choice whether or not to terminate or continue with the agreement if the parties entering the relevant contract intends to make time of the essence.
>
> As the agreement became voidable, section 65 must be read together with section 56(1):
>
> > When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit so far as may be, to the person from whom it was received.
>
> The plaintiff elected to end the SPA through a letter/notice by the solicitor dated 30.6.2001 considering the defendant has failed to fulfil his obligations and terms of the agreement within the period specified in the SPA.
>
> Pursuant to Clause 27 of the SPA, the time period of 30 months to deliver vacant possession is of the essence of the agreement. As the defendant has failed to prove that there was any application to extend time from the Housing Ministry or discharge of responsibility on the defendant's part to deliver vacant possession within the time frame specified there are, therefore no matter or issue to be tried. As such, the plaintiff had the right to terminate the Sale and Purchase Agreement and are entitled to receive the return of monies paid by the Plaintiffs or paid on their behalf and any other miscellaneous expenses incurred. …

[23] The learned judge was absolutely correct when he stated that the respondents had the choice of terminating the S&P or alternatively claiming for damages for late delivery. It is obvious that the respondents could not terminate the S&P and at the same time claim for damages for late delivery. The learned judge

had allowed only the termination and not damages for late delivery. For that reason, we see no error in the judgment of the learned judge.

2. The Delay Was Beyond The Appellant's Control

[24] Learned counsel for the appellant submitted that cl. 22 of the S&P provides:

> … Vendor shall not be liable to the purchaser for any failure on its part to fulfil any term herein if such fulfillment is delayed, hindered or prevented by circumstances beyond the Vendor's control including … delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said Land and other circumstances of whatever nature beyond the Vendor's control.

[25] Clause 1(1) of the S&P defines "Appropriate Authorities" as follows:

> … any governmental, semi or quasi-governmental or statutory body or government-approved privatised corporation having jurisdiction in all matters relating to the development of the said Land …

[26] The appellant contended that the certificates of construction of works show that the appellant had completed the development of the said land on 27 April 1998 which was more than a year before the completion date and the date of delivery of vacant possession as stipulated in the S&P which was 15 March 1999. What remained to be completed was the remaining basic infrastructure, which include the telephone services and electrical infrastructure. The appellant further contended that for the electrical infrastructure it had to deal with TNB, a government approved privatised corporation. There was a massive delay on the part of TNB to fulfil its obligations to complete the electrical infrastructure. The appellant stated that the cause of the delay was in selecting the contractor and mobilizing the site for cable works. TNB wanted to lay their cables only during the construction of houses despite the fact that TNB knew at that time that no houses were built by the appellant. Sometime in 1997, the appellant offered to undertake the electrical infrastructure works itself but this was rejected by TNB because TNB undertook to do the electrical infrastructure works by itself. However, some ten months later TNB changed its mind and requested the appellant to complete the electrical infrastructure

works itself. The change of mind by TNB left the appellant with such a short period of time to complete the electrical infrastructure works, so much so it was almost impossible for the appellant to complete the works within the stipulated period. The appellant claimed that it completed the works in November 1999, except for the part to be completed by TNB which until March 2000 had yet to be completed.

[27] The respondents contended that under the Fourth Schedule to the S&P, the obligations to complete the telephone and electrical infrastructure works were with the appellant and not with TNB and Maxis. The respondents further contended that the appellant was in control of the circumstances pertaining to the sub-contracts with TNB and Maxis and as such could not rely on cl. 22 of the S&P as an excuse for the delay. The exclusion clause in cl. 22 which is stated as "... or other circumstances of whatever nature beyond the vendor's control" should be restricted only to cover circumstances which is similar or in relation to other words used in cl. 22. Clause 22 specifically provided for such circumstances as "force majeure", "acts of god", "civil commotion", "inclement weather", "acts of war", "strike loss", or "damage by fire", "flood", "tempest", "delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said land". The respondents went on to say that according to the *ejusdem generis* rule, if a general description follows specific words, the general description ie, the words "or other circumstances of whatever nature beyond the Vendor's control" should be given a restricted meaning and should be in the same nature of the specific words. Applying the *ejusdem generis* rule and also on the proper construction of the contract, the delay and default of third party contractors or sub-contractors such as TNB or Maxis is not covered by cl. 22.

[28] The learned trial judge in his judgment made the following observation:

> The Defendant failed to prove that the third parties' delay was beyond the control or care of the Defendant. Therefore the Defendant did not have the protection under Clause 22 of the said Agreement. Additionally, Clause 13 of the said Agreement stipulates that the Defendant was under an obligation to ensure that the basic infrastructure works are ready as stated in the Fourth Schedule of the said Agreement.

Clause 13 of the SPA reads:

> The vendor shall, at its own costs and expense, construct or cause to be constructed the basic infrastructure serving the development, namely roads, drains, culverts, electricity installations and water mains in accordance with the requirements and standards of the Appropriate Authority and more specifically set out in the Fourth Schedule hereto.

[29] Going through the evidence and as pleaded by the appellant itself, the delay was caused by laying the electrical and telephone cable late. I agree with the conclusion of the learned trial judge that the delay as pleaded is not a delay as stipulated by cl. 22 of the S&P. The delay in the present appeal was by the appellant's sub-contractors who were under the control of the appellant. The S&P clearly provides for a completion date and I believe this is also true in the sub-contracts with TNB and Maxis. The appellant could terminate the sub-contracts when it became obvious that the sub-contractors could not complete the works within the stipulated time. As it was the appellant did nothing and now uses cl. 22 of the S&P as an excuse for the delay.

[30] For the reasons stated above, I agree with the learned trial judge that the delay was not a delay within the exclusion cl. 22 of the S&P.

3. Waiver And/Or Estoppel

[31] The last issue raised by the appellant in this appeal was waiver and/or estoppel. The appellant submitted that under the S&P, delivery of vacant possession on the land was to have been on or before 15 March 1999 and time was made the essence. The appellant submitted that the respondents elected to keep silent when the delivery of vacant possession was not effected on 15 March 1999. On the other hand, the respondents continued to pay the quit rent for the years 1999 and 2000 which were their obligations under the S&P. It was further submitted by the appellant that the respondents waited for two years and three months before issuing the purported notice of termination which was dated 30 June 2001. The appellant contended that the act of the respondents constituted a waiver and/or gives rise to an estoppel and cited *Cheah Khoon Tee v. Crimson Development Sdn Bhd* [1999] 8 CLJ 79; *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 and *Charles Richards Ltd. v. Oppenheim* [1950] 1 All ER 420.

[32] In reply, the respondents submitted that they had never indicated to the appellant that it was acceptable to the respondents that the appellant fulfilled its promise of the delivery of vacant possession at a later date other than that stipulated by the S&P. Silence and time having passed by themselves are not evidence of a waiver. The respondents then cited *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275 and *Tai Kim Yew & Ors v. Sentul Raya Sdn Bhd* [2004] 3 CLJ 310. The respondents further submitted that the relevant period for the court to look into the conduct of both parties was between the completion date (15 March 1999) to the termination date (30 June 2001). During this period the respondents did not take any step which could even remotely be said to amount to a waiver save as to pay the quit rent (a statutory payment) which the appellant might have refused to pay whereby opening the respondents to sanctions by way of fines, etc. For that reason, the respondents had no choice but to make those payments. Anyway, the respondents did not play an active role in the payment of quit rent because the quit rent was paid by the appellant on behalf of the respondents to the local authorities as it is based on the master title which has yet to be sub-divided. Further, it was MBSB who was charged by the appellant for the payment of the quit rent. The appellant did not adduce any other evidence which could be constituted as a waiver or estoppel on the part of the respondents.

[33] The respondents did not dispute the fact that they did nothing when the date for delivery of vacant possession came into being. The appellant termed this as silent on the part of the respondents. Silence by itself could not be interpreted as a waiver. It does not mean anything unless there is additional factor which together with the silence could be interpreted or inferred as a waiver and/or estoppel as seen in *Sim Chio Huat v. Wong Ted Fui (supra)* where in allowing the time to pass and keeping silent to the repudiation and also the fact that the respondent had asked the appellant to do extra works during that period would as a whole tantamount to a waiver and/or estoppel. In the present appeal, except for the silence, the respondents did nothing at all. As such, I am of the view that there is no act on the part of the respondents which could be constituted as a waiver or estoppel.

[34] The appellant also raised the issue of whether the termination by the respondents was a rescission or repudiation. The appellant submitted that when the learned judge relied on s. 65 of the Contracts Act 1950, the learned judge erroneously

treated the S&P as having been rescinded instead of being terminated. As we understand, the official judgment of the learned trial judge was in Bahasa Malaysia while the English version was only a translation. In his judgment the learned judge stated as follows:

> Pihak Plaintif telah membuat pilihan untuk menamatkan PJB melalui surat/notis melalui peguamcaranya bertarikh 30.6.2001 memandangkan pihak Defendan telah gagal memenuhi obligasi serta terma perjanjian dalam tempoh masa yang ditentukan dalam PJB.
>
> Menurut fasal 27 PJB tempoh masa 30 bulan bagi menyerahkan milikan kosong merupakan intipati perjanjian. Memandangkan Defendan gagal membuktikan bahawa terdapat sebarang permohonan untuk perlanjutan masa dari Kementerian Perumahan atau pelepasan tanggungjawab tersebut di pihak Defendan untuk menyerahkan milikan kosong dalam masa yang telah ditetapkan maka tiada perkara atau isu yang harus dibicarakan. Justru itu Plaintif adalah berhak untuk menamatkan Perjanjian Jual Beli tersebut dan berhak juga mendapatkan kembali wang-wang yang dibayar olehnya atau bagi pihaknya serta lain-lain perbelanjaan hangus. Oleh yang demikian Mahkamah membenarkan permohonan pengisytiharan Plaintif:
>
> (i) Telah menamatkan PJB bertarikh 15.9.1996 pada 30.6.2001.
>
> (ii) Defendan hendaklah kembalikan wang berjumlah RM217,011.50 yang telah dibayar Plaintif kepada Defendan..
>
> (iii) Defendan hendaklah kembalikan wang yang telah dibayar oleh Malaysia Building Society Berhad kepada Defendan bagi pihak Plaintif berjumlah RM8,111.00 bersama-sama faedah.
>
> (iv) Defendan memulangkan balik semua kos guaman yang telah dibayar bagi menyempurnakan PJB berjumlah RM3,818.56.
>
> (v) Faedah ke atas dua dan tiga dari tarikh pemfailan tindakan ini kepada tarikh bayaran.

[35] From the above, one can see that the term used by the learned judge was "menamatkan" which means terminate. He did not say whether the termination was a rescission or repudiation. In the present appeal the termination by the respondents was because the appellant was in breach of the S&P for not being able to deliver vacant possession of the subject property within the time stipulated in the S&P. I agree with the submission of the respondents' counsel that when a termination is as a result of a

breach of one of the parties, the innocent party should be placed in the same position as it was before the agreement. In the present appeal the respondents are the innocent party and they have claimed damages in that whatever money that have been paid by them and by MBSB should be refunded to the respondents as well as to MBSB. In the case of the money paid by MBSB the appellant have to pay the interest charged by MBSB on the amount advanced by MBSB. The appellant did not dispute the amount already paid by the respondents and MBSB to them.

[36] I am of the view that the learned judge came to the correct decision and made the right order as stated above. The appeal by the appellant is hereby dismissed with costs. The order of the learned judge is hereby affirmed. The deposit is to be paid to the respondents to the account of taxed costs.

[37] My learned brother, Tengku Baharudin Shah Tengku Mahmud, JCA has seen this judgment in draft and has indicated his agreement with it.

Zaleha Zahari JCA:

[38] This is an appeal from an order of the High Court Kuala Lumpur dated 4 January 2002.

[39] The judge held on the facts presented before him that the sale and purchase agreement dated 15 September 1996 (SPA) executed between the defendants (appellants in this appeal) as vendor on the one part, and the plaintiffs (respondents in this appeal) as purchaser on the other part, of a bungalow lot known as Plot No. 2-1888, Bukit Mahkota, Phase 2, Mukim Beranang, Daerah Ulu Langat, Selangor Darul Ehsan ("the property") had been validly terminated by the respondents on 30 June 2001. The appellants were then ordered to return to the respondents the sum of RM217,011.50 representing 80% of the purchase price which had been paid by the respondents to the appellants towards the purchase, as well as RM8,111, the amount paid by the respondents' financier Malaysia Building Society Bhd (MBSB) to the appellants together with interest. The learned judge further directed reimbursement of the legal costs incurred by the respondents to perfect the SPA amounting to RM3,818.56, as well as interest on the RM217,011.50 and RM8,111, from the date of filing of the action to the date of payment to the respondents.

[40] I have had the advantage of reading the judgment of Mokhtar JCA in draft. I agree with his findings that the Deed of Assignment executed in this case was an absolute assignment and not by way of charge only. I am also in agreement with the subsequent finding that when the respondents commenced proceedings against the appellants on 16 October 2001, they had the capacity to do so for the reasons stated in the judgment.

[41] Be that as it may, in respect of the main issue as to whether the SPA had been validly terminated by the respondent, my view differs for the following reasons.

[42] On the facts of this case delivery of vacant possession of the said property was to be effected within 30 calendar months from the date of the SPA ie, by 15 March 1999. Time was made of the essence to the contract by cl. 16(2) of the SPA. If the said property was not delivered within the agreed period, the appellant would pay the respondent liquidated damages to be calculated on a daily basis at the rate of 8 % p.a. of the purchase price.

[43] The SPA requires the appellants to provide what is described as "basic infrastructure work". From the Third Schedule to the SPA, the completion of the basic infrastructure work was the last stage before the delivery of vacant possession. The Fourth Schedule to the SPA, shows that the basic infrastructure includes telephone services and electrical infrastructure. It is clear from the evidence on record that there was a delay in completion of the basic infrastructure work.

[44] The record also shows that as early as at November 1998, the appellants had completed all that they could under the project leaving that which is to be completed by TNB. The delay in completing the electrical infrastructure was the cause of delay in delivery of vacant possession. As at March 2000 (delivery of vacant possession was due by 15 March 1999), the electrical infrastructure works were still not completed by TNB and the appellants was still pressing for the supply of electricity by TNB. In this circumstance the learned judge was clearly right in finding that there has been a breach of the SPA by the appellants. The issue for determination is what are the rights and obligations of parties to a contract in such a situation?

[45] Sections 40 and 56 of the Contracts Act 1950 ("the Act") provides that:

A

> 40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

B

> 56.(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

C

[46] Section 40 of the Act uses the phrase "In its entirety" in describing the extent of the breach. The contract breaker must have "refused to perform … his promise in its entirety" before the "promisee may put an end to the contract". Section 56(1) of the Act uses the phrase "fails to do any such thing at or before the specified time" to describe the nature of the breach which would make a contract voidable.

D

[47] From the authorities I understand the legal position to be as follows: Where a promissory wrongfully repudiates a contract in its entirety, the promisee has a choice. The promisee may elect to accept the repudiation, and treat the contract as at an end, and sue for damages. The primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. (See *Moshi v. Lep Air Services* [1973] AC 331). Alternatively, the promisee may elect to reject the repudiation and treat the contract as subsisting. The court has to make an objective appraisal of the facts from the words and conduct of the parties as to which course was adopted. An election once made is irreversible (*Sergent v. ASL Development Ltd* [1974] 131 CLR 634, 655). For the doctrine of repudiation to apply, the breach must go to the root of the contract (See *Mayson v. Clouet & Anor* [1924] AC 980; *Bowes v. Chalever* [1923] 32 CLR 159; *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha* [1962] 2 QB 26).

E

F

G

H

[48] In *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231 Gopal Sri Ram JCA said:

I

> The right of an innocent party to put an end to future obligations under a contract is sometimes referred to as "the right to rescind" and the act of termination as "rescission". This terminology is erroneous and misleading. True rescission is specific relief. It is

available to a litigant either as self-help upon satisfaction of certain conditions. (See *Car & Universal Finance Co Ltd v. Caldwell* [1965] 1 QB 525) or as judicial remedy obtainable in an action. It was invented by the Court of Chancery and now finds its place in Chapter IV of our Specific Relief Act 1950. It has the effect of setting at naught the contract *ab initio* and not merely as to obligations *de futuro*. It places the parties on a footing as though the contract had never been made. The difference between the so called "rescission" which is in truth nothing more than the act of terminating future obligations under a contract and rescission in its true sense is brought out in the following passage in the speech of Lord Wilberforce in *Johnson v. Agnew* [1980] AC 367, at pp 392, 393:

> At this point it is important to dissipate a fertile source of confusion and make clear that although the vendor is sometimes referred to the above situation as "rescinding" the contract, this so called "rescission" is quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud, or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion). In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission *ab initio*".

[49] Lord Wilberforce repeated this in *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 AER 556 when he said:

> ... when in the context of a breach of contract one speaks of "termination" what is meant is no more than that the innocent party or in some cases, both parties are excused from further performance. Damages, in such case, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages, whether it "liquidates" them, or limits them, or excludes them? These difficulties arise in part from uncertain or inconsistent terminology. A vast number of expressions are used to describe situations where a breach has been committed by one party of such a character as to entitle the other party to refuse further performance; discharge, rescission, termination, the contract is at an end, or dead, or displaced; clauses cannot survive or simply go. I have come to think that some of the difficulties can be

> avoided; in particular the use of "rescission". Even if distinguished from rescission *ab initio*, as an equivalent for discharge, … may lead to confusion in others. To plead uniformity may be to cry for the moon. But what can and ought to be avoided is to make use of these confusions in order to produce a concealed and unreasoned legal innovation …

[50] Learned counsel for the respondents in supporting the orders made by the learned judge argued that on the facts of this case, the learned judge was entitled to set aside the whole transaction. Having found that the SPA had been rightfully terminated, according to him, the learned judge had, rightly, to unravel the transaction and restore the parties to their original position as if the contract had never been made. This involved the return of all monies not only towards the purchase price of the said property, but other financial charges and expenses which the respondents had to bear towards the purchase. He submitted that the appellants' breach in failing to deliver the said property together with the agreed infrastructure facilities within the specified time rendered the contract voidable by reason of s. 56(1) of the Act. The respondents had avoided the contract by their letter of termination dated 30 June 2001 and were entitled to *restituo in integrum.*

[51] With respect, I am unable to agree with the respondents argument. At common law the right to "rescind" a contract by way of termination only arises when there has been a total failure of consideration. On the facts of the present case, there was no refusal by the appellants to perform the contract by not doing the things they promised to do within the time specified by the contract in its entirety. There was no total failure of consideration. From the Certificate for Stage of Construction of Works, it is clear that the appellants had completed their part of developing the said property on 27 April 1998 which was more than a year before the date for delivery of vacant possession, (ie, more than a year before 15 March 1999). What remained to be completed was the "Remaining Basic Infrastructure".

[52] It is evident from the record that the appellants had problems with TNB and there was delay in the electricity infrastructure. The delay in delivering up the property was caused by delays of the relevant authorities in circumstances beyond the appellant's control. This did not in my judgment amount to a failure to do all of the things that the appellants had promised. This is not a case where there was a fundamental breach on the

part of the appellants resulting in the respondents being deprived of the whole benefit which was the intention of the parties they would obtain from the contract. Applying s. 40 of the Act, I am of the view that the appellants' breach did not go to the root of the contract.

[53] By allowing the delivery dates to pass by and by acquiescing in the work continuing under the agreement, the respondents must be held to have waived their right to rescind the SPA on account of repudiation and also the right to treat themselves as discharged therefrom. On the facts, they must be deemed to have elected to treat the SPA as still continuing (*Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363, Federal Court).

[54] As for delay in delivery, cl. 16(2) provides for the formula for compensation which the appellants must pay for their lateness. I am of the view that this is the clause which the respondents should seek recourse to as it created a contractual obligation to pay a sum by way of liquidated damages for the period during which they were kept out of the property which they had purchased, such sum being calculated upon the basis set out in the agreement. (See, *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37).

[55] For the reasons given, I am therefore unable to agree with the conclusion of the High Court Judge. I am of the view that the learned judge had erred in holding that the SPA had been lawfully terminated, and consequentially also in ordering a refund of the purchase price paid as well as the other financial charges or disbursements.

[56] On my part, I would allow the appeal with half costs to be awarded to the appellants. The orders of the High Court are set aside. In their place I would enter judgment for the respondents for damages for late delivery to be assessed by the senior assistant registrar of the High Court. The deposit to the appellants.